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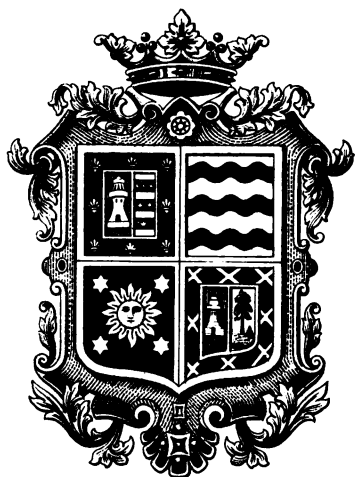
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United States - Attorney General.

1850

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OPINION
OF
THE ATTORNEY GENERAL
CONCERNING
BRITISH RECRUITMENT
IN THE
UNITED STATES.

1856.

OPINION

OF

THE ATTORNEY GENERAL

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CONCERNING

BRITISH RECRUITMENT

IN THE

UNITED STATES.

WASHINGTON:

A. O. P. NICHOLSON, PUBLIC PRINTER.

1856.

1856, May 27.
Bill of
G. S. Ballou & Co.,
Washington.

EXECUTIVE MANSION,

Washington, August 6, 1855.

The reports of the district attorneys of the southern district of New York and the eastern district of Pennsylvania, on the subject of the levy of troops in the United States by official or other agents of Great Britain, are returned herewith to the Attorney General, and his opinion is required upon the question, whether or not the acts reported are in violation of the municipal law and of the national sovereignty and neutrality; and especially upon the question, what legal responsibility, if any, those acts devolve on the British minister and British consuls.

FRANKLIN PIERCE.

1856 1926

OPINION.

ATTORNEY GENERAL'S OFFICE,

August 9, 1855.

SIR: I have the honor to submit herewith the considerations of law applicable to the enlistment of troops within the United States by the British government, in so far as the facts appearing in documents before me concern the personal action either of the British minister or of the British consuls in the United States.

There is no room for doubt as to the law regarding the general question.

In the first place, the act of Congress of April 20th, 1818, contains the following provision:

"SEC. 2. *And be it further enacted*, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered, into the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years." (iii Stat. at Large, p. 448.)

Of course, as the levy of troops within the United States for foreign service is forbidden by law, no such right has, by your permission, been given to Great Britain. To the contrary of this, the British

government was expressly notified, by letter of Mr. Marcy to Mr. Crampton of April 28th, 1854, that no enlistments in the United States would be permitted either to Great Britain or to Russia. (Ex. Doc., 1st session 33d Congress, vol. xii, No. 103, p. 5.)

In the second place, independently of the municipal relations of the acts in question, they constitute, whether they be the acts of the British government or of its minister and consuls, a violation of the sovereignty and of the neutral rights of the United States.

The rule of public law is unequivocal on this point, and is correctly stated, as follows, by Wolff:

"Since the right of raising soldiers is a right of majesty, which must not be violated by a foreign nation, it is not permitted to raise soldiers on the territory without the consent of its sovereign." (*Jus Gentium*, s. 1174.)

By Vattel: "As war cannot be carried on without soldiers, it is evident that, whoever has the right of making war, has also naturally that of raising troops. The latter, therefore, belongs likewise to the sovereign, and is one of the prerogatives of majesty." (Vattel, *Droit des Gens*, liv. 3, ch. ii, s. 7.)

* * * * *

"As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country without the permission of the sovereign; and, even with that permission, none but volunteers are to be enlisted; for the service of their country is out of the question here, and no sovereign has a right to give or sell his subjects to another.

"Whoever undertakes to enlist soldiers in a foreign country without the sovereign's permission, and, in

general, whoever entices away the subjects of another state, violates one of the most sacred rights of the prince and the nation. This crime is distinguished by the name of kidnapping or man-stealing, and is punished with the utmost severity in every well-regulated state. Foreign recruiters are hanged without mercy, and with great justice. It is not presumed that their sovereign has ordered them to commit a crime; and supposing even that they had received such an order, they ought not to have obeyed it; their sovereign having no right to command what is contrary to the law of nature." * * * "But if it appears that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against him, unless he makes suitable reparation." (Ibid. s. 15.)

By Kluber: "A state entirely neutral has the right to exact, even by force, if necessary, that belligerent powers do not use neutral territory for the purposes of war; that they take not therefrom munitions of war, and provisions and other immediate requirements of war, for their armies; *that they do not make there any military preparations, enrolments or collections of troops*; that none of their troops, armed or unarmed, pass through, &c., &c.; that they exercise there no act of hostility against the persons or property of the subjects of the hostile state; that they do not occupy it militarily, or make it the theatre of war." (*Droit des Gens moderne de l'Europe*, s. 285.)

By G. F. de Martens: "Whilst, in case of rupture between two nations, a neutral state preserves the full enjoyment of its territorial rights, it can, in the absence of treaties, prohibit during the war, as in time of peace,

any passage or sojourn of foreign troops, and much more forbid the occupation of its fortresses, *the recruiting*, mustering, and exercising *troops*; and it may use force against those who shall attempt to violate the prohibition." (*Précis du Droit des Gens*, s. 350.)

By Galiani: "All governments are accustomed to forbid, under capital penalty, any foreigner to make military engagements or *recruits within their territory*; in doing which they do no more than to sustain and defend a natural right, and one inherent in every sovereignty. * *

"The neutral sovereign, who leaves his subjects at liberty to engage themselves in the service of a foreign belligerent, will not therein be wanting to his neutral duties, provided it has been customary with his nation; if it has been usual in time of peace; if it accords with the physical and political condition of the country; if, in fine, he practices indifference and impartiality, not denying to one belligerent what he concedes to the other. But if a sovereign has not been accustomed to allow his subjects to enlist in the military or naval service of other governments, it may well be doubted whether he may, for the first time, do it on the occurrence of war between two states, each of which is in amity with him. I am not prepared to say that in so doing he gives equality of advantage and facilities to both; there might be inequality in the need of the belligerents; for perhaps *one of them, suffering from deficiency of men, would derive precious and powerful succor from such permission, while to the other it would be useless and superfluous*. In my opinion, therefore, this question comes within the general rule of essential neutral duties: that is, to continue in the anterior condition, it being lawful to persevere in what has been

usual, but unlawful to innovate." (*Dei Doveri de' Principi Neutrali*, p. 325, 327, 329.)

By Hautefeuille: "The duties of belligerents may be summed up in very few words. The belligerent ought to abstain from the employment of all such indirect means to molest his enemy as, in the accomplishment of their object, would first injuriously affect a neutral nation. He ought to respect, in the most complete and absolute manner, the independence and sovereignty of nations at peace; in a word, he ought to treat them in the same manner as if the most profound peace continued to prevail. Those nations, in fact, are at peace with him, fulfilling strictly their duties of neutrality; they have the right to enjoy the advantages of their position, and to be exempt from all the evils of war; the duty of the belligerent is to abstain from the infringement of this right. Thus neutral territory ought to be held sacred and inviolable by nations at war; these last ought not, on any pretext, nor in any manner, to make use of such territory to subserve their purposes of hostilities, directly or indirectly. The passage of armed troops, *the levying of soldiers*, &c., &c., without the consent of the sovereign, would constitute an offence against the sovereignty of the neutral, and a violation of the duty of the belligerent." (*Droits et Devoirs des Nations Neutres*, tom. i, 312, 313.)

"As to the territory of neutral nations, the occurrence of hostilities makes no change nor modification of their rights: they remain inviolable as in time of peace. Their territory ought, then, to be sheltered from all enterprises of the belligerents, of whatever nature they may be. The consequences of war ought never to be felt by them directly; that is to say, no act of hostility should be committed against them, under any pretext.

"Belligerent nations, in this respect, have only the rights they possessed in time of peace, because war never injuriously affects nations at peace. Belligerents cannot, then, in any case, without the permission of the sovereign, use neutral territory, I do not say directly, for the operations of war; but cannot even make use of it for any advantage whatever, to the prejudice of their enemy. This permission cannot be granted to them by the neutral without violating his duties.

"The principle of the inviolability of the territory being admitted, the conclusion, as absolute as the principle itself, follows: that a belligerent has no right to use neutral territory, in any manner whatever, without the permission of the neutral nation, sovereign of such territory; and cannot, therefore, *levy troops there*, and march armies through it, &c., without this permission.

"The neutral has the incontestable right to resist every attempt the belligerent may make to use his territory; to oppose it by all the means in his power, and even by force of arms, in the same manner as a citizen has the right to defend his property by all the means placed at his disposal by the law to which he is subject." (*Ibid.*, tom. ii, pp. 48, 49.)

I do not perceive that this doctrine is explicitly produced in any one of the books of international law published during the last few years in Great Britain. Possibly their silence on this point may be caused by the policy of their country, which, under the kings of the house of Hanover, has frequently relied upon foreign recruits in time of war. However this may be, some of the English works referred to recognise the right of every sovereignty to the exclusive use of its own territory and resources, (Wildman's International Law, vol. i, p. 64,) but without adverting to the present

logical consequence of this right; although one of them discusses fully the collateral question, whether a state loses its neutrality by permitting foreign levies, and concludes, properly, that if it be permitted to one, it should be permitted to each, of the respective belligerent powers. (Manning's Law of Nations, bk. iii, ch. i.)

In this connexion the same accredited English writer considers and confutes the assumption, crudely and erroneously taken up in Great Britain, that some doctrine to the contrary of this is to be found in Vattel; and, upon an elaborate review of the whole subject, he concludes thus :

“Foreign levies may not be allowed to one belligerent, while refused to his antagonist, consistently with the duties of neutrality. When treaties, *antecedent* to war, permit such exclusive privilege, then * * no complaint of breach of neutrality can be maintained by the excluded party. But, when no antecedent treaty exists, such a permission would be a violation of neutrality, the principles of which demand the strictest abstinence from assistance to either party, and, of course, will not admit that exclusive privileges, in so important a particular, should be granted to one belligerent. Nor have the customs of Europe, derived from the practices of the middle ages, established any usage that prevents this question from being settled in accordance with the dictates of reason, or, in other words, with the law of nature.” (Manning, *ibid.*, p. 180.)

Mr. Manning's reasoning is conclusive so far as it goes. And the imperfection of other English law books in this respect is of no account, as against the general authority of the expounders of international law in all the rest of Christendom.

Misconstruction has also been placed on the fact that Bynkershoek maintains the right of private or voluntary expatriation, even for the purpose of foreign military service. But he does not express nor countenance the thought that a foreign belligerent may recruit soldiers in a neutral country without the consent of its sovereign. On the contrary, he exhibits in full the legislation of the United Provinces, according to which it was a capital offence to make enlistments in the country without consent of the States General. (*Quæst. Jur. Publici*, lib. i, c. 22.)

Besides, Great Britain has, in her own legislation, sanctioned and adopted the rule of public law, by enacting that if any person whatever, within the United Kingdom, or in any part of the dominions of Great Britain, shall hire, engage, retain, or procure, or shall attempt or endeavor to hire, retain, engage or procure any person whatever to enlist, or to enter or engage to enlist, as an officer, soldier, sailor, or marine, either on land or sea service, for or under or in aid of any foreign prince or government, or to go or to agree to go or embark from any place in the British dominions for the purpose or with the intent to be so enlisted, entered, or engaged as aforesaid, every person so offending shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment, at the discretion of the court having jurisdiction of the act. (Act of 59 Geo. III, ch. 69.)

We, in the United States, acting in the sense of natural right, and following the rules of public law as explained by the jurists of continental Europe, asserted and established this doctrine at a very early period, in opposition to the undertaking of the French government, through its minister, M. Genet, to man or equip cruisers within the United States. (Mr. Jefferson to

M. Genet, June 17, 1793. American State Papers, For. Aff., vol. i, p. 154.)

And our judicial text-books are full and explicit on the same point. (Wheaton by Lawrence, p. 498; Kent's Com., lec. 6.)

It is obvious to the most superficial reflection, that no distinction of principle exists in the levy of a military force in the neutral country, as between the land and sea service; and if Great Britain may raise within the United States volunteers for her land service, so Russia may raise them for her marine service, that is, may fit out privateers in our ports; and, indeed, if we grant or permit the former privilege to Great Britain, we must, in like manner, in order to be impartially neutral, concede the latter privilege to Russia.

And it is equally obvious that foreign recruiting must not be forbidden or permitted under the influence of any assumed national sympathies or antipathies. Individual or national preferences are quite immaterial in such a question. The United States cannot, either lawfully or honorably, practice a simulated neutrality; nor can a dissembled alliance be claimed or expected from us, either by Great Britain or by Russia.

From the well-established rules and principles of law, then, it is plain to conclude:

1. The acts of enlistment in question are contrary to the municipal law of this country, and indictable as a high misdemeanor.

2. Those acts, if permitted to one belligerent, must be permitted to all, in observance of impartial neutrality.

3. Being against law in the United States, and therefore not permitted to Great Britain, if undertaken by her as a government, they afford just cause of war,

being direct national violation of the territorial sovereignty of one nation by another.

4. Whatever agents of the British government, whether official or unofficial, acting voluntarily or by orders, have participated in such acts, are not only guilty of a criminal infraction of the statute law, but also, in the language of Vattel, of violating one of the most sacred rights of the nation.

I presume that if, in the present case, the British minister imagines that the acts performed under his direction were not contrary to the municipal law, it must be on the ground that the recruits were not completely enlisted in the United States; that is, did not here in all form enter the military service of Great Britain. That assumption is altogether fallacious. The statute is express, that if any person shall hire or *retain* another person *to go beyond the limits* or jurisdiction of the United States, *with intent* to be enlisted or entered into the service of any foreign state, he shall be deemed guilty of the defined misdemeanor.

It is possible, also, that he may have supposed that a solemn contract of hiring in the United States is necessary to constitute the offence. That would be mere delusion. The words of the statute are "hire or retain." It is true, our act of Congress does not expressly say, as the British act of Parliament does, "whether any enlistment money, pay, or reward shall have been given and received or not," (Act 59 Geo. III, ch. 69, s. 2;) nor was it necessary to insert these words. A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, to pay recruiting

money in fact, but under another name of board, passage money, expenses, or the like, it would be idle to pass acts of Congress for the punishment of this or any other offence.

However this may be, and if such were the thought of the British government, it has not been successfully carried out; for, on the evidence before me, including the general instructions of the British minister and his direct correspondence with recruiting officers in the United States and others, my opinion is positive, that the parties have made themselves amenable to the penalties of the statute, and may be convicted before any competent court of the United States.

It is further to be observed, in conclusion of this branch of the subject, that, whether the acts of the British minister and his agents, in recruiting troops within the United States, do or do not come within the technical provisions of the act of Congress, is altogether immaterial to the question of international right, as between this government and that of Great Britain. If, by ingenious evasions of the letter of a penal statute intended only for private malefactors, the British government should, nevertheless, levy troops here, the fact of the statute being thus defeated and trampled under foot would serve only to augment the public wrong.

Suppose, for instance, that the British government shall have said to its officers, civil or military, in the British North American provinces, and to its diplomatic or consular agents in the United States: "You will proceed to raise so many men in the United States; but remember that to do so is forbidden by the municipal law of that country, and is indictable as a misdemeanor; you will, therefore, take care to proceed cunningly in this, so as not to incur the penalties

of the statute." Such instructions, while they might have the effect of raising the troops, as desired by the British government, without its agents incurring the penalties of the statute, would but constitute a more flagrant and aggravated violation of the national dignity and the sovereign rights of the United States.

In truth, the statute in this matter is of but secondary account. The main consideration is the sovereign right of the United States to exercise complete and exclusive jurisdiction within their own territory; to remain strictly neutral, if they please, in the face of the warring nations of Europe; and of course not to tolerate enlistments in the country by either of belligerents, whether for land or sea service. If there be local statutes to punish the agents or parties to such enlistments, it is well; but that is a domestic question for our consideration, and does not regard any foreign government. All which it concerns a foreign government to know is, whether we, as a government, permit such enlistments. It is bound to ask permission of us before coming into our territory to raise troops for its own service. It has no business to inquire whether there be statutes on the subject or not. Least of all has it the right to take notice of the statutes only to see how it may devise means by which to evade them. Instead of this, it is bound, not only by every consideration of international comity, but of the strictest international law, to respect the sovereignty and regard the public policy of the United States.

Accordingly, when, at the commencement of the great European struggle between England and France, near the close of the last century, the French Convention assumed to recruit marine forces in the United States, it was held by President Washington, and by

his Secretary of State, Mr. Jefferson, as explained in the correspondence hereinbefore quoted, that by the law of nations, in virtue of our sovereignty, and without stopping to enact municipal laws on the subject, we had full right to repress and repel foreign enlistments, and, *e converso*, that the attempt to make any such enlistments was an act of gross national aggression on the United States.

When a foreign government, by its agents, enters into the United States to perform acts in violation of our sovereignty, and contrary to our public policy, though acts not made penal by municipal law, that is a grave national indignity and wrong. If, in addition to this, such foreign government, knowing that penal statutes on the subject exist, deliberately undertakes to evade the municipal law, and thus to baffle and bring into disrepute the internal administration of the country, in such case the foreign government not only violates but insults our national sovereignty.

I repeat, then, that, if it were to be supposed that the British government had so far forgotten what is due to its own dignity, as to instruct its agents within the territories of the German Bund, in the Netherlands, in the United States, to enlist recruits without respect for local sovereignty, but with care to avoid or evade the letter of local statutes, instead of diminishing, that would aggravate the injustice and illegality of the proceeding in the eye of the law of nations, and the intensity of the public wrong as regards the neutral states thus converted, without their consent, into a recruiting ground for the armies of Great Britain.

Such instructions would be derogatory to our public honor in another respect. They presume that the United States, without becoming the open ally of Great

Britain, will, by conniving at the use of their territory for belligerent purposes, while professing neutrality, thus carry on, as already intimated, a dishonorable war in disguise against Russia.

It appears, however, that the British government, finding it impossible to keep the ranks of its army filled by voluntary enlistments, and being loth to encounter the responsibility of a law for conscription, for draughts on militia, for periodical service of its able-bodied men, or for any other systematic method of raising troops from its own population, introduced into Parliament a bill entitled "An act to permit foreigners to be enlisted, and to serve as officers and soldiers in her Majesty's forces," but which was in fact a bill to authorize the government to employ agents to carry on recruiting service in the neutral states of Europe and America.

The law was earnestly objected to in its progress, as insulting to neutral states and derogatory to the national dignity, but was passed, nevertheless, on the 22d of December, 1854. (Hansard's Debates, third series, vol. 136, *passim*.)

At any early day after the passage of this act, measures were taken to recruit officers and men, for a proposed foreign legion, in the United States, those measures being publicly pursued under the official responsibility of Sir Gaspard le Marchant, lieutenant governor of the province of Nova Scotia. A military depot was established at Halifax for the reception and enrolment of recruits; and Mr. Howe, a member of the provincial government, with other agents, came into the United States to make arrangements for engaging and forwarding the recruits, chiefly from Boston, New York, and Philadelphia. Subsequently, corresponding arrange-

ments were made for collecting and forwarding recruits from the western States, by Buffalo or Niagara, through Upper Canada.

These acts were commenced and prosecuted with printed handbills and other means of advertisement, and recruits were collected in depots at New York and elsewhere, and regularly transported to Canada or Nova Scotia, with undisguised notoriety, as if the United States were still a constituent part of the British empire. Of course, they attracted great attention, and the various measures, whether legal or political, proper to put a stop to them, were instituted by your direction, through the instrumentality of the foreign or legal departments of the government of the United States.

In the course of the investigations which ensued, among the facts brought to light are some, in the documents referred to me, which unequivocally implicate, not only British consuls, but the British minister himself, in the unlawful transactions in question, and so call for inquiry as to the rights of this government in reference to them and their government.

In the application of the general rules of law to the offences committed, it is necessary to distinguish between the case of any of the consuls and that of the minister.

The several district attorneys of the United States, within whose jurisdiction, respectively, the cases occurred, very properly assumed that the consuls were subject to indictment for infraction of the municipal law, and have proceeded accordingly, prosecutions having already been instituted in the southern district of Ohio against the consul at Cincinnati, and in the southern district of New York against an officer of the consulate of New York.

Nothing is better settled by adjudication in this country, than that foreign consuls are subject to criminal process for violation of the municipal laws. (*United States vs. Ravara*, ii Dall., 297; *Mannhardt vs. Soderstrom*, i Bin., 144; *Commonwealth vs. Kosloff*, i Serg. and R., 545; *State vs. De la Foret*, ii Nott and Mc., 217.)

These adjudications are in exact conformity with the law of nations in regard to consuls, as understood and practised not less in Great Britain than in the other states of Christendom. (See *Opinion*, November 4, 1854, MSS.; also, *Kent's Com.*, vol. i, p. 44; *Wheaton's El. by Lawrence*, 305.)

The only privilege, which a consul enjoys in this respect, in the United States, is that awarded to him by the constitution, of being tried by the federal courts: the effect of which is, that his case remains within the control of the general government, which may deal with it according to the convenience or the exigencies of its foreign policy, without impediment from the authority of any of the individual States of the Union. (*Const.*, art. iii, sec. 2; act of September 24, 1789, sec. 9, i *Stat. at Large*, p. 77.)

The consul at Cincinnati, as appears by the legal proceedings there, supposes that he is entitled to the benefits of certain peculiar stipulations in the consular convention between the United States and France, of February 23, 1853. If it were so, that would not serve him on the main point, because it does not exempt consuls from the criminal jurisdiction of either of the contracting governments. But this convention has no application whatever to the consular relations of Great Britain and the United States. Whether it applies or not to governments with which we have entered into

stipulations to place our respective consuls on the footing of the most favored nation, is a question as yet *sub lite*. But there is no stipulation of that nature in existence, as between Great Britain and the United States. Of course, the duties and the rights of American consuls in Great Britain, and of British consuls in the United States, stand upon the law of nations, except as the same is modified by their treaties, and by the local law of either country. The local law of each, as we have seen, withholds from consuls the diplomatic privilege of extraterritoriality. A British consul, therefore, has no just cause of complaint, if, when charged with an offence, he is held amenable to the criminal jurisdiction of the United States.

In addition to those ordinary means of redress in the case of the misconduct of a foreign consul, is that afforded by the law of nations. The President of the United States has the undoubted power, in his discretion, to withdraw the *exequatur* of any foreign consul. To justify the exercise of this power, he does not need the fact of a technical violation of a law judicially proved. He may exercise it for any reasonable cause, whenever, in his judgment, it is called for by the interests or the honor of the United States. (De Clercq, *Guide des Consuls*, p. 101.)

On each of these points provision was made in the commercial convention between the United States and Great Britain of July 3d, 1815, which stipulates that "before any consul (in either country) shall act as such, he shall, in the usual form, be approved and admitted by the government to which he is sent; and, * * in case of illegal or improper conduct towards the laws of the government of the country to which he is sent, such consul may either be punished according to law, if the law

will reach the case, or be sent back ; the offended government assigning to the other the reasons for the same." (Art. iv.)

This convention, by its terms, was to subsist only four years. By a subsequent convention, that of October 20th, 1818, its duration was prorogued ten years, (art. iv;) and afterwards, by the convention of August 6th, 1827, for another ten years, and until denounced by either party on twelve months' notice.

For the rest, the stipulations of the convention of 1815, as continued by the conventions of 1818 and 1827, are but declaratory of the law of nations, as that is understood both in Great Britain and the United States.

In regard to the minister, it is clear, if he violate the laws of the government to which he is accredited, or otherwise offend its sovereignty, there is no remedy except in the manner and form prescribed by the law of nations. He enjoys an exemption from judicial process, which immunity is not so much his right as that of his government.

It was formerly held in England, as we see in March's case, reported by Rolle, in the time of James I, that, "although an ambassador is privileged by the law of nature and of nations, yet, if he commit any offence against the law of nature or reason, he shall loose his privilege, but not if he offend against a positive law of any realm." (Rolle's R., p. 175.) No such distinction between *mala prohibita* and *mala in se*, as respects ambassadors, is now admitted; and their extritoriality is the unanimous doctrine of all publicists, and is recognised in England, as it is in the United States, by statute.

The whole question is learnedly discussed by Wildman, whose views are in accordance with those of Grotius and Bynkershoek, which now prevail throughout Christendom. (Institutes, vol. i, p. 90)

But the privilege of extritoriality is not conferred on a public minister as a shield to crime. For any crimes, which he may commit, the remedy varies according to the nature of the case.

As to offences against the municipal law of the country, committed by a foreign minister, or other person entitled to the privilege of diplomatic extritoriality, we have a statute which declares that any writ or process against them, issued by any court, is utterly null and void. (Act of April 30, 1790, sec. 25, i Statutes at Large, p 117.) And this immunity of public ministers has been the subject of judicial recognition in several instances. (See United States *vs.* Hand, ii Wash. C. C. R., 435; United States *vs.* Liddle, *ibid.*, p. 205; *exparte* Cabrera, *ibid.*, p. 232. See also Wheaton by Lawrence, p. 284; Kent's Com., vol. i, p. 38; Opinion of Mr. Attorney General Lee, of July 27, 1797.)

The cases of criminality on the part of a public minister may be distinguished into the following classes:

1st. If the crime committed by the minister affect individuals only, (*delicta privata*,) the government of the country is to demand his recall; and if his government refuse to recall him, the government of the country may either expel him by force, or bring him to trial, as no longer entitled to the immunities of a minister. (Kluber, *Droit des Gens*, sec. 211; Ch. de Martens, *Guide Diplomatique*, tom. i, p. 88.)

2d. If the crime affect the public safety of the country, its government may, for urgent cause, either seize and hold his person until the danger be passed, or expel him from the country by force; for the safety of the state, which is superior to other considerations, is not to be perilled by overstrained regard for the privileges of an ambassador. (*Ibid* ; see also Kent, vol. i, 38;

schooner *Exchange vs. McFadden*, vii Cranch, 116, 139.) Indeed, it has been held, in such a case, in England, that the offending party may be proceeded against for treason. "If," it is affirmed in the case of *Rex vs. Owen*, "an ambassador compass and intend death to the king's person, in the land where he is, he may be condemned and executed for treason." (*Rex vs. Owen*, Rolle's R., p. 188.) But that dictum is not in accord with precedents, which, in general, go no further than the arrest and confinement, and the eventual or the immediate expulsion, of a public minister, for treasonable acts, or acts dangerous to the security of the state.

Signal instances of the arrest or summary expulsion of public ministers in such a case, are collected by Bynkershoek, by Wicquefort, by Wildman, and by Charles de Martens, (*Causes Célèbres*.)

A very modern case of great notoriety is that of Sir Henry Bulwer, who, while British minister at Madrid, during the administration of the Duke of Valencia, (General Narvaez,) being detected in complicity with domestic revolutionists, was required by letter of the Duke of Sotomayor, the Spanish Minister of Foreign Affairs, to quit Spain immediately, and did so. (Hernandez, *España y el Visconde Palmerston*, Madrid, 1848.)

This incident occasioned a brief interruption of the diplomatic relations of the two governments; but Spain stood firm; and, as Sir Henry Bulwer had acted under the instructions of Lord Palmerston, the British Minister of Foreign Affairs, the British government, after some delay, and the exchange of explanations, conscious that it had been placed in the wrong by Lord Palmerston, submitted to send a new minister to Madrid. (Hansard's Debates, third series, vol. 99, p. 347.)

3d. Finally, if the offence be grave, but not such as to

compromise the public safety, the course of proceeding in accordance with the law of nations, and sanctioned by diplomatic usage, is to demand the recall of the minister, and meanwhile to refuse, or not, all further intercourse with him, according to the circumstances.

The United States have pursued this course in several instances, of which a memorable one, and exactly pertinent to the present case, is the demand on France for the recall of M. Genet, guilty of enlistments in this country without the consent of its government. (Am. State Papers, For. Aff., vol. i, No. 65.)

The public law and usage in this respect are well stated by a modern English author, who says:

“With respect to the dismissal of ministers, it is usual, where the matter admits of delay, first to demand his recall. * * But this is a mere act of courtesy, which cannot be expected on occasions of imminent peril. The dismissal of an ambassador on such occasions is not an assumption of jurisdiction, but a measure of self-defence, which no one has ever denied to be legal in the case of ambassadors. * * If an ambassador use force, he may be repelled by force. * * When the danger is imminent, an ambassador may be seized as a public enemy, may be imprisoned, may be put to death, if it be indispensably necessary to our safety.” (Wildman, Institutes, vol. i, p. 114.)

On the whole, the case of the British minister, regarded in the light of established rules of the law of nations, and diplomatic usage founded thereon, would seem to resolve itself into, first, a question of strict right; and, secondly, of discretion in the exercise that right.

It clearly is not a case affecting the security of the state, and thus needing or justifying the interposition

of summary authority, as in the instance of the Prince of Cellamare in France, (Ch. de Martens, *Causes Célèbres*, tom. i, p. 139,) Count Gyllenberg in Great Britain, (Foster's Crown Law, p. 187,) and many other cases of historical and legal notoriety or interest. No acts of violence are imputed to the British minister, nor any purpose or act threatening to the national stability of the United States. What is charged against him is conduct improper in a public minister, illegal as respects the municipal law, injurious to the national sovereignty. If sufficiently shown, it requires to be repressed in such manner as effectively to vindicate the public honor. Of strict right, the President may, as the Queen of Spain did in the case of Sir Henry Bulwer, send his passports to the British minister, with intimation to leave the country without delay; or he may well, in his discretion, adopt the milder course, as President Washington did in the case of M. Genet, that is, after affording to the British minister opportunity of explanation through the Secretary of State, then, if his explanation be not satisfactory, to demand his recall of the Queen's government. The personal esteem, which the British minister justly enjoys here in other respects, might counsel the latter course, more especially if the British government, assuming the responsibility of his acts, should thereupon proceed to tender, in its own name, complete and ample satisfaction for having authorized or permitted such a flagrant wrong, as the systematic attempt to recruit a military force in the United States, by the instrumentality of the lieutenant-governor of Nova Scotia.

I have the honor to be, very respectfully,

C. CUSHING.

The PRESIDENT.

APPENDIX.

ATTORNEY GENERAL'S OFFICE,

March 23, 1855.

SIR: The Secretary of State has referred to me your letter to him of the 22d instant, enclosing a handbill signed "Angus McDonald," who proposes to recruit soldiers for the military service of the British government, and advertises a recruiting station for that object at a place indicated in the city of New York.

Statements corroborative of this document appear in sundry newspapers of New York.

It is perfectly clear that any such enlistment is contrary to law. The act of Congress of April 20, 1818, not only forbids military enlistments in the United States, for a purpose hostile to any country in amity with us, but also by foreign states for any purpose whatever.

If the troops recruiting for Great Britain in New York are intended to serve against Russia, the undertaking is in violation of our neutrality; and, if not, still it is in violation of the sovereign authority of the United States.

Not long since the consul of the Mexican republic at San Francisco was duly tried and convicted there of this precise offence, in having enlisted persons in California for the domestic service of his government.

These views of the present question have been submitted to the President, and have his approbation; and he accordingly has directed me to advise you at once, in order to avoid delay, and to desire you to take the

proper and lawful steps, in your discretion, to bring to punishment all persons engaged in such enlistments within your district.

I am, very respectfully,

C. CUSHING.

Hon. JOHN McKEON,

United States Attorney, New York.

ATTORNEY GENERAL'S OFFICE,
September 12, 1855.

SIR: In reply to your letter of the 10th instant, on the subject of the indictments pending against persons charged with recruiting for the military service of Great Britain, I have the honor to make the following observations:

Mr. McKeon has been advised of the desirableness of conferring with you personally, either by himself or his assistant, in regard to new evidence to which he may have access, and which can be useful to you.

I suggest the expediency of trying only a part of the cases now, especially if you fail to convict in some leading case.

But the most important consideration is this:

This government has, of course, addressed to that of Great Britain such demands of public redress and satisfaction in the premises as the national honor requires. But the government of Great Britain, with extraordinary inattention to the grave aspect of its acts, namely, the flagrant violation of our sovereign rights involved in them, has supposed it a sufficient justification of what it has done to reply, that it gave instructions to its agents so to proceed as not to infringe our municipal laws; and it quotes the remark of Judge Kane in sup-

port of the idea that it has succeeded in this purpose. It may be so: Judge Kane is an upright and intelligent judge, and will pronounce the law as it is, without fear or favor.

But if the British government has, by ingenious contrivances, succeeded in sheltering its agents from conviction as malefactors, it has in so doing doubled the magnitude of the national wrong inflicted on the United States.

This government has done its duty of internal administration, in prosecuting the individuals engaged in such acts. If they are acquitted, by reason of a deliberate undertaking on the part of the British government not only to violate as a nation our sovereign rights as a nation, but also to evade our municipal laws, and that undertaking shall be consummated by its agents in the United States, when all this shall have been judicially ascertained, the President will then have before him the elements of decision as to what international action it becomes the United States to adopt in so important a matter.

I am, very respectfully,

C. CUSHING.

JAS. C. VAN DYKE, Esq.,

United States Attorney, Philadelphia.

ATTORNEY GENERAL'S OFFICE,

September 17, 1855.

SIR: I desire to make a further suggestion in regard to the trial of parties charged with recruiting soldiers in the United States for the service of the British government.

It is known that instructions on this subject were

given by that government to its officers in the United States. We are told by Lord Clarendon that those officers had "stringent instructions" so to proceed as not to violate the municipal law; that is, to violate its spirit, but not its letter. If so, the instructions themselves violate the sovereign rights of the United States.

But, in the meantime, every consul of Great Britain in the United States is, by the avowal of his government, subject to the just suspicion of breach of law; while, apparently, he must either have disobeyed his own government, or, in obeying it, have abused his consular functions by the violation of his international duty to the United States.

In these circumstances, it is deemed highly necessary that the British consul at Philadelphia, or any other officer of the British government, shall not be suffered to interfere in the trials, as he attempted to do on a previous occasion; that no letter of his be read except in the due form of evidence; and that if he have anything to say, he shall be put on the stand by the defence, in order that he may be fully cross-examined by the prosecution.

It is clear that he has no right, by any rule of public law, or of international comity, to be heard in the case by the court, otherwise than as a witness, whether enforced or volunteer.

I have the honor to be, very respectfully,

C. CUSHING.

JAS. C. VAN DYKE, Esq.,

United States Attorney, Philadelphia.

ATTORNEY GENERAL'S OFFICE,

October 20, 1855.

SIR: I have the honor to acknowledge the reception of your two communications of the 16th and 17th instant, in which you inform me of the conviction of Joseph Wagner, accused of the offence of being engaged in unlawfully recruiting troops within the United States for the service of Great Britain, and request instructions as to other indictments of the same class still pending in your district.

These prosecutions were instituted, primarily, for the purpose of arresting the continued perpetration of acts derogatory to the sovereignty and public honor, and contrary to the neutral policy of the United States.

The punishment of crime in these, as in all other cases of infringement of statute provisions, of whatever nature, was an object also, but in these particular cases a secondary one; for the individual misdemeanor of the parties implicated, whether they be citizens or foreigners, and whether private or official persons, is but a minor incident of the national indignity and wrong inflicted on this government by the foreign government, in whose behalf and for whose benefit they presume to violate the laws of the United States.

If, therefore, you find that what has thus far been done by you so judiciously and successfully suffices to maintain the public peace and vindicate the public justice within your district, you will make such disposition, as in your discretion seems best, of the remaining complaints against any persons, who, do not hold an official relation to the British government.

As to guilty persons of the latter description, whether yet under prosecution or not, their criminal acts stand

on a different ground, and additional instructions regarding them will be forwarded to you in due time.

Such persons are not only indictable, in common with all others who violate the law of the land, but they are also violators of the international law, and subject to special consideration by the United States, unless disavowed and punished by their own government.

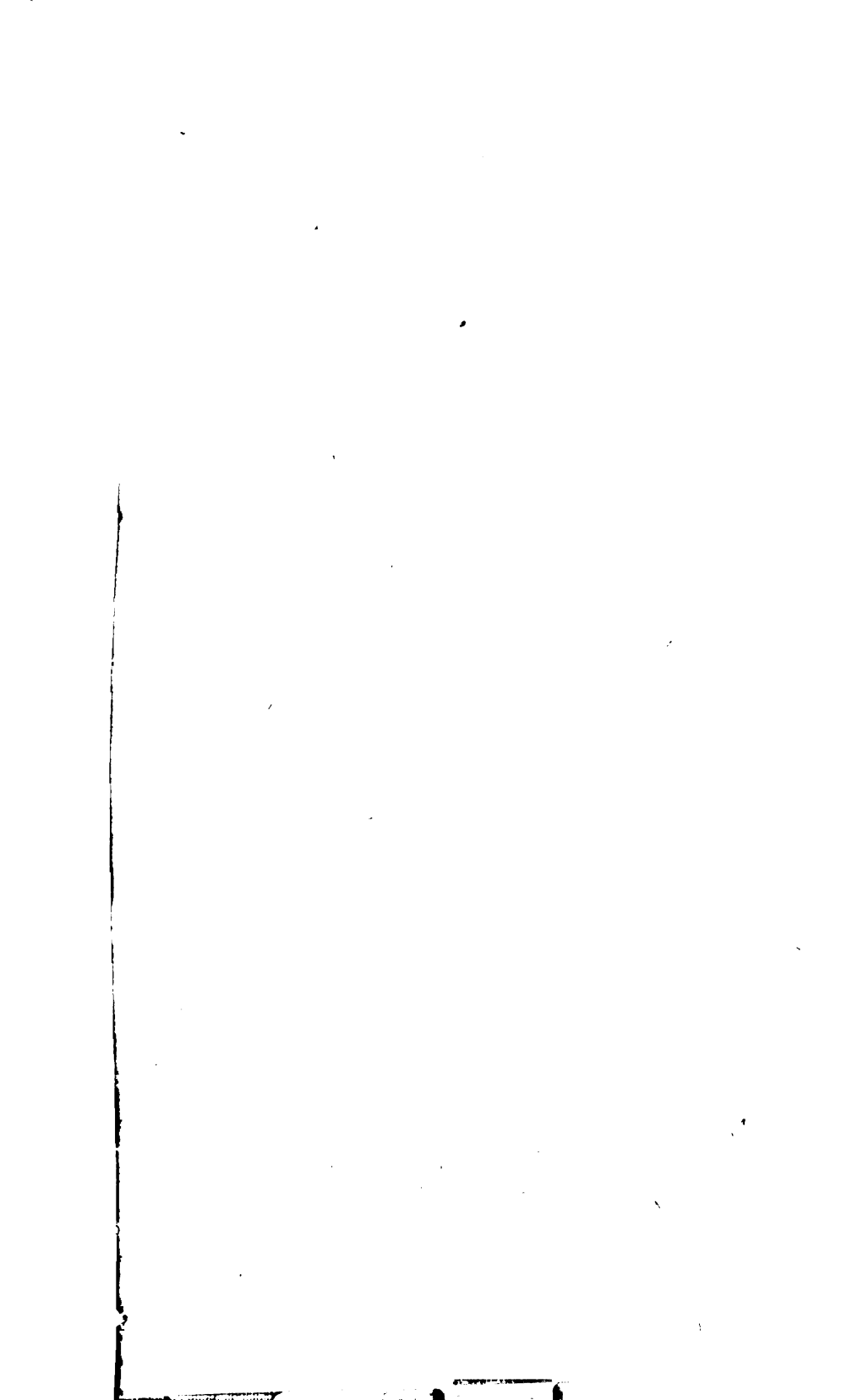
I have the honor to be, your obedient servant,

C. CUSHING.

Hon. JOHN McKEON,

United States Attorney, New York.

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